

UNITED STATES DISTRICT COURT

for the

Western District of Washington

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MAR 25 2015	
CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA	
BY	DEPUTY

In the Matter of the Search of
*(Briefly describe the property to be searched
 or identify the person by name and address)*

See Attachment A - Computers and Electronic
 Storage Media

Case No. MJ15-5048

APPLICATION FOR A SEARCH WARRANT

I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that on the following person or property *(identify the person or describe the property to be searched and give its location)*:

See Attachment A, attached hereto and incorporated herein by reference.

located in the Western District of Washington, there is now concealed *(identify the person or describe the property to be seized)*:

See Attachment B, attached hereto and incorporated herein by reference.

The basis for the search under Fed. R. Crim. P. 41(c) is *(check one or more)*:

- ☒ evidence of a crime;
- ☒ contraband, fruits of crime, or other items illegally possessed;
- ☐ property designed for use, intended for use, or used in committing a crime;
- ☐ a person to be arrested or a person who is unlawfully restrained.

The search is related to a violation of:

Code Section
 26 U.S.C. § 7206(1)

Offense Description
 False Tax Filings

The application is based on these facts:

See Affidavit of Special Agent Aaron Hopper, attached hereto and incorporated herein by reference.

- ☒ Continued on the attached sheet.
- ☐ Delayed notice of _____ days (give exact ending date if more than 30 days: _____) is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attached sheet.

Aaron Hopper

Applicant's signature

Aaron Hopper, Special Agent, IRS

Printed name and title

Sworn to before me and signed in my presence.

Date: 3/25/15

City and state: Tacoma, Washington

J. Richard Creatura

Judge's signature

J. Richard Creatura, U.S. Magistrate Judge

Printed name and title

STATE OF WASHINGTON)
) SS
COUNTY OF PIERCE)

I. INTRODUCTION

2. The March 13th Warrant authorized, among other things, the seizure of computers and electronic storage media for which searching agents had probable cause would contain evidence, fruits, and instrumentalities of the offense of False Tax Filing, in violation of Title 26, United States Code, Section 7206(1), as described in the warrant. The March 13th Warrant, however, did not permit a further search of the contents of any seized computers or electronic storage media absent a subsequent warrant. This Affidavit

1 is made pursuant to the protocols set forth in the March 13th Warrant to seek further
 2 authorization to examine and search the contents of the seized computers and electronic
 3 storage media for evidence, fruits, and instrumentalities of the offense of False Tax
 4 Filing, in violation of Title 26, United States Code, Section 7206(1) as further set forth in
 5 Attachment B.

6 **II. EXPERIENCE OF AGENT**

7 3. I am a Special Agent with the Internal Revenue Service, Criminal
 8 Investigation (IRS-CI). Relevant aspects of my background and experience are as set
 9 forth in the earlier Affidavit submitted in support of the March 13th Warrant, attached
 10 hereto and incorporated herein as Attachment C.

11 4. Because this Affidavit is submitted for the limited purpose of establishing
 12 probable cause in support of the application for a search warrant, it does not set forth
 13 each and every fact that I or others have learned during the course of this investigation. I
 14 have set forth only the facts that I believe are necessary to the determination of probable
 15 cause to believe that evidence, fruits, and instrumentalities of violations of Title 26,
 16 United States Code, Section 7206(1) (False Tax Filing) will be found within the forensic
 17 images of computers and electronic storage media lawfully seized from Troy Kelley's
 18 residence pursuant to the March 13th Warrant.

19 **III. IDENTIFICATION OF DEVICES TO BE EXAMINED**

20 5. The items to be searched are forensic images acquired of certain computers
 21 and electronic storage media (hereinafter, collectively, "Images"), which devices are
 22 specifically described below and again in Attachment A, attached hereto and incorporated
 23 herein. The Images are currently maintained at the IRS-CIS Lab, located at 915 Second
 24 Ave., Room 2301, Seattle Washington, 98174:

- 25 a. National Guard Thumb Drive;
- 26 b. Kingston Data Traveler 4GB Thumb Drive;
- 27 c. Memorex Mini TravelDrive 4GB Thumb Drive;
- 28 d. ASUS Eee-PC 1005HAB Notebook w/ product key ending in B63;

- e. Apple iMac A 1419 Serial Number: D25KJ08KDNCV;
- e. Optometric Physicians of WA Thumb Drive;
- f. Three unlabeled CDs
- g. Lexar Jumpdrive JDE-128-04-500 Thumb Drive;
- h. LaCie Porsche Design P9223 External Hard Drive; and
- i. PNY 4GB Thumb Drive.

6. The applied-for warrant would authorize the forensic examination of the Images for the purpose of identifying electronically stored data particularly described in Attachment B.

IV. PROBABLE CAUSE

A. Probable Cause to Seize the Images

7. On March 16, 2015, pursuant to the duly authorized March 13th Warrant, law enforcement executed a search of Troy Kelley's residence located at 2521 Fremont Street, Tacoma, Washington. Among the items seized were the computers and electronic media listed above.¹ According to information provided by IRS Special Agent and Computer Investigative Specialist, John Medunic Jr., there was probable cause to seize the computers and electronic storage media because they were found under circumstances that demonstrated that Troy Kelley likely had access to the devices, and, as a result, that the items sought in the March 13th Warrant may be found in them. Specifically, all electronic evidence items seized were located in what appeared to be a home office area within the residence. The room contained a desk and shelving, and numerous items found in the desk area indicated that the office belonged to or was used by Troy Kelley. A business card holder on the shelf above the desk contained business cards of Troy Kelley. Additionally, the right desk cabinet drawers contained various business cards for Troy Kelley and photo IDs bearing Troy Kelley's picture.

¹ In addition to the items specifically described in "Section III Identification of Devices to be Examined," agents also removed from the residence one additional unlabeled CD, for a total number of 4 seized unlabeled CDs. However, one of those CDs proved to be blank through physical observation of the CD's backside. Therefore, only three CDs were ultimately imaged.

1 8. All electronic evidence items noted above were found in a powered off
2 state. The Apple iMac A1419 All-In-One desktop and the ASUS Eee laptop computer
3 were found on the top of the desk in the home office area. The harddrive, thumb drives,
4 and CDs were found inside the drawers of the same desk in the home office area. The
5 electronic evidence items were seized from the warrant location and transported back to
6 the IRS-CIS Lab for imaging. The items were removed from the site because, in the
7 experience of the IRS Special Agent Medunic, a forensic image of an iMac computer
8 typically takes 8-10 hours to acquire. Therefore, rather than attempt to image on site, all
9 electronic evidence items were taken to the IRS-CIS lab for imaging. Imaging of the
10 computers began on March 16, 2015. Imaging of the remaining electronic storage media
11 began on March 17, 2015.

12 9. After imaging the iMac, Special Agent Medunic powered up the computer
13 to verify normal operations and, in accordance with the authority granted by the March
14 13th Warrant, to preview the computer in an attempt to verify users. The iMac booted
15 directly to display the desktop screen without displaying first a separate log-on prompt.
16 The desktop showed the names and icons of program files and document files. Special
17 Agent Medunic did not review any of the files. Special Agent Medunic then performed a
18 normal shutdown. The shutdown dropdown menu showed a user name of "Troy Kelley."

19 10. After imaging the ASUS Eee-PC Notebook, Special Agent Medunic also
20 powered on the laptop to verify normal operations and, per the March 13th Warrant, to
21 preview in an attempt to verify users. Upon booting, the screen displayed the Windows
22 log-on screen with two user names of "Troy" and "Diane." No further review of the
23 laptop was conducted and Special Agent Medunic performed normal shutdown
24 procedures.

25 11. All other electronic evidence items seized consisted of removable media
26 (external hard drive, thumb drives and CDs). Forensic images of the media were
27 acquired by Special Agent Medunic without further preview.
28

1 12. Upon completion of the imaging of the electronic evidence items, a backup
2 copy of the images was created and segregated from the original images. All imaging
3 was completed by March 18, 2015. On March 19, 2015, all seized electronic evidence
4 items were returned to counsel for Troy Kelley.

5 **B. Probable Cause to Search Content of Seized Images**

6 13. The Affidavit submitted in support of the original March 13th Warrant set
7 forth probable cause to believe that relevant electronic records are likely to be maintained
8 in computers and electronic media controlled by Kelley. In addition to those reasons, the
9 physical search of the residence revealed additional facts that provide further support to
10 the probable cause determination that relevant electronic evidence will be found in the
11 Images.

12 14. As detailed in the March 13th Warrant Affidavit, on or about April 19,
13 2013, Kelley consented to a voluntary interview with IRS-CI Special Agents. During
14 that interview, Kelley explained, in substance, that he was holding reconveyance fees in
15 an impound account, and that as he or his company did further work on reconveyances,
16 he moved what was earned from the impound account and then reported the income on
17 tax returns. Kelley further explained that reconveyances typically took about ten years
18 and that the work for which the impounded reconveyance fees had been originally given
19 was not complete.

20 15. During the search of Kelley's residence, searching agents found and seized
21 hard copies of documents that, on their face, corroborate Kelley's statements to the IRS
22 that Blackstone was continuing to work on reconveyances and was incrementally earning
23 the money that was held in an impound account. However, a closer examination of these
24 documents raises questions about the reasons for, and the timing of their creation, which
25 may be answered by an examination of the contents of the Images seized from Kelley's
26 home.

1 16. Among the physical documents seized from Kelley's residence was a
2 document entitled "Blackstone International, Inc." (hereinafter, "Blackstone Document").
3 The document is not addressed to anyone. The document states in part:

4 It is understood that Blackstone International, Inc. is
5 responsible for the continued tracking of documents that its
6 subsidiary, United National, LLC, contracted out to complete.
7 Blackstone will open no new files. Blackstone will not
8 itemize its costs. Blackstone will complete the work and
9 recognize income from the impound account it has been
10 charged to manage at a rate of 10% per year, until all income
11 is recognized and the account balance reaches \$0 in ten years.
12 Blackstone will track these documents until releases are
13 recorded and will be solely responsible for incurring costs to
14 release the documents

15 In the event of litigation or pending litigation against itself or
16 any client, Blackstone will suspend any such payment for
17 services to itself. This will not preclude Blackstone from
18 paying third parties in the course of receiving releases. At the
19 conclusion of such litigation, payments will resume

20 * * * *

21 The revenue recognition schedule above is based on multiple
22 Private Letter Rulings from the IRS to First American
23 Corporation and Fidelity National Financial, and Staff
24 Accounting Bulletin No. 101 (Revenue Recognition in
25 Financial Statements). . . . If there is a change of law or
26 opinion in this area, Blackstone will follow the guidance of
27 the IRS and SEC to either accelerate or decelerate the
28 recognition of income.

29 The Blackstone Document appears to have been signed and dated by hand in the name of
30 Troy X. Kelley with a date of "7-1-08."

31 17. Agents also recovered a hardcopy of a document written under the heading
32 "ATS Attorney Trustee Services, Inc." (hereinafter, "ATS Letter"). This document
33 appears not to have been dated, but was addressed "To all clients." The document stated
34 in part:

35 Effective July 1, 2008, our businesses have undergone a
36 reorganization to better serve you. Our new company is

1 Attorney Trustee Services, Inc. (ATS), and we hope we will
2 earn your document tracking business for files that have not
3 yet closed escrow. The old company, United National LLC
4 dba The Post Closing Department (PCD) was closed on June
5 30, 2008. PCD's parent company, Blackstone International
6 Inc., will continue to handle all files that were opened by
7 PCD. . . .

8 * * * *

9 A note on your old files. Blackstone will track those
10 documents until they are released, including court judgments,
11 liens and mobile home releases. . . . You will no longer
12 receive the two email statements from us informing you when
13 we will deduct the open order set up charge, or the continuing
14 tracking charges from the impound account that we hold.

15 There will be no new orders to enter into the system. And the
16 continuing charges . . . will no longer be itemized in a
17 spreadsheet. Instead, the account will reset on July 1, 2008,
18 and ten percent will be deducted each year to cover costs of
19 closing out the old files over the next ten years. For the older
20 files, we are still responsible for paying for all costs to record
21 the release, in cases where you initially collected more than
22 the minimal open order fee and forwarded that to us.

23 18. The contents of the Blackstone Document and the ATS Letter appear to
24 neatly corroborate Kelley's explanation given in April 2013 to IRS-CI Special Agents
25 about the reasons behind his yearly draw-down of reconveyance fees he held in what he
26 termed an impound account. These documents also appear to provide support for how it
27 was that Blackstone continued to incur business expenses into tax years 2011 and 2012.
28 The ATS Letter specifically noted that Blackstone was "still responsible for paying for all
costs to record the release" Moreover, if these documents were indeed created in or
about July 1, 2008, prior to Kelley having been directly implicated in the civil law suits
regarding reconveyance fees, and long prior to any law enforcement contact, they would
tend to show that Kelley had a consistently-applied understanding of the tax treatment of
the reconveyance fees that was not motivated by possible legal and criminal exposure.

1 19. There is reason, however, to question the timing of the creation of both the
2 Blackstone Document and the ATS Letter. As detailed in the March 13th Warrant
3 Affidavit, on or about August 2, 2010, Kelley was deposed under oath in connection with
4 a lawsuit brought by his former escrow company client, Old Republic Title. During the
5 deposition, Kelley was questioned about the reasons why in June of 2008 he took
6 millions in accumulated reconveyance processing fees and transferred them to an account
7 opened in the name of a newly formed company. Kelley testified that the fees taken in
8 2008 were earned as a result of past "services provided," not, as these newly discovered
9 documents purport, to be placed in an impound account and drawn down for future work.
10 At another point in the deposition, Kelley explained that the fees were placed in an
11 account in the name of a new entity at the "advice of counsel" for "estate planning"
12 reasons. At no point in the deposition did Kelley explain that, in fact, Post Closing
13 Department's parent company, Blackstone, had taken over responsibility for working the
14 remaining files from Old Republic and others, and would, therefore, continue to perform
15 services and legitimately earn the fees into the future. Nor did Kelley testify at the
16 deposition that he had informed Old Republic or other clients of such a plan back in
17 2008.

18 20. The Blackstone Document and the ATS Letter appear to be printed copies
19 of documents that originated from a computer. They also appear to have been prepared
20 by Troy Kelley. Both documents were found in Kelley's home and at least the
21 Blackstone Document was signed by Kelley. Therefore, there is probable cause to
22 believe that electronic evidence relating to the dates of creation of these documents and
23 others relevant to this investigation as set forth in Attachment B may be found in the
24 Images.

25 21. During the execution of the March 13th Warrant, agents also recovered a
26 hardcopy of a document entitled "Bill of Sale 2012 Toyota Highlander." The document
27 is dated "2-1-13." This document purports to record the sale of a vehicle belonging to
28 Blackstone to an unidentified purchaser for \$20,000, and is signed by Troy X. Kelley as

1 president of Blackstone International, Inc. The Bill of Sale further included an
2 explanation for the transfer, stating “[b]ecause of a change in the needs of the business
3 that could not be anticipated, this vehicle is being sold.” The Bill of Sale also stated that
4 the payment for the vehicle must be made by “October 15, 2013.” Records from
5 Blackstone’s Columbia Bank Account *8470 did not indicate a payment to Blackstone in
6 an exact amount of \$20,000 during 2013. However, the bank records do show a deposit
7 to Blackstone of a check written on Kelley’s personal Bank of America Account *8143
8 on October 8, 2013, for the amount of \$30,000.

9 22. The March 13th Affidavit noted that the nature and amounts of business
10 expense deductions declared for Blackstone changed in the tax return filed after Kelley’s
11 contact with the IRS-CI in April of 2013. For example, Blackstone’s Form 1120S for the
12 tax year 2013, while it reported the same \$245,000 of gross profits as it did in 2011 and
13 2012, no longer reported depreciation for any vehicle. Instead, Blackstone reported a sale
14 of a vehicle on February 1, 2013. Depreciation for a business vehicle or vehicles had
15 been a substantial portion of the business expense deductions reported in Blackstone’s
16 prior tax years.

17 23. The Bill of Sale recovered from Kelley’s residence appears to support the
18 information found on Blackstone’s Form 1120S for tax year 2013, and further supports
19 the conclusion that the vehicle was disposed of prior to any contact with law
20 enforcement, and, hence, was not motivated by concerns of criminal exposure. On the
21 other hand, the Bill of Sale appears self-serving in content and timing. It is unclear how,
22 as of February 1, 2013, Blackstone encountered a “change in the needs of the business
23 that could not be anticipated” requiring the complete disposition of its business vehicle,
24 but still earned exactly the same \$245,000 in gross profits as it did in the prior two years
25 when Kelley claimed 100% business use of two and then one vehicle.

26 24. This Bill of Sale for the Toyota Highlander, like the Blackstone Document
27 and the ATS Letter discussed above, appears to have been generated on a computer. The
28 Bill of Sale appears also to have been created by Troy Kelley. It was found in his

1 residence and his signature appears on the document. Therefore, there is probable cause
2 to believe that relevant electronic evidence relating to the date of creation of this
3 document and others relevant to this investigation may be found in the Images.

4 25. During the execution of the March 13th Warrant, agents also recovered
5 approximately 204 pages of what appeared to be spreadsheets collectively containing
6 thousands of lines of information. The individual pages are grouped together into 5
7 separate bundles, each of which was secured with clip-binders. The spreadsheets are
8 organized vertically into several columns, but nowhere do they show any column
9 headings that would expressly indicate what the information in each column means.
10 However, upon examination, I was able to conclude that on most lines, one column
11 appears to indicate the name of a Washington State county, another column appears to
12 indicate a deed of trust recording number, another column appears to include the name of
13 a lender, and then the final column sometimes is filled in with what appears to be a deed
14 of reconveyance recording number. On some lines, however, the deed of reconveyance
15 cell is left blank.

16 26. I took a small sample of some of the numbers from the spreadsheets that
17 appeared to be deed of trust recording numbers and referenced that number on the county
18 recording office's website for the county indicated in the spreadsheet. With most
19 samples, the deed of trust recording number matched an existing deed of trust in that
20 county and, where there was an associated deed of reconveyance recording number, the
21 county information also matched the spreadsheet's deed of reconveyance number. Many
22 deed of reconveyance recording number begins with the year in which the deed is
23 recorded. The reconveyance recording numbers that are shown on the recovered
24 spreadsheets primarily span recording dates from 2004 through 2007, years in which
25 Kelley operated Post Closing Department.

26 27. On their face, these spreadsheets give the appearance that Kelley and his
27 company may indeed be continuing to service old files from his former clients in order to
28 support the yearly draw-downs of reconveyance fees he had originally taken in 2008. On

1 the front page of one of the bundles of spreadsheets is found a hand written notation
2 "2013," and in some of the lines of the spreadsheets where there is a deed of trust number
3 but not a reconveyance number, a handwritten notation "c" appears. The "c" may be an
4 indication that some sort of work was done to track and "complete" that reconveyance.

5 28. There is reason again, however, to question the rationale for and the timing
6 of the creation of these spreadsheets. As detailed in the March 13th Warrant Affidavit,
7 on or about May 14, 2008, putative class action lawsuits were filed on behalf of escrow
8 customers against two of Kelley's escrow company clients, Fidelity and Old Republic,
9 alleging that the companies collected excessive and duplicative reconveyance fees. In
10 about September 2008, counsel for the lead plaintiff served Kelley with a subpoena *duces*
11 *tecum* seeking, among other things "[a]ny and all statements, journals, account analyses,
12 or other related documents referring or relating to the following from January 1, 2003 to
13 the present: reconveyance processing, reconveyance tracking"

14 29. Kelley, however, produced very little material in response to the subpoenas,
15 and did not himself produced spreadsheets containing individual reconveyance tracking
16 information like the ones recovered from Kelley's residence. Instead, he and his counsel
17 maintained throughout the class action litigation, and in the subsequent direct litigation,
18 that the majority of Kelley's business records were burned in a fire that occurred in June
19 2008 in an Everett office building in which Kelley had stored his records. On October
20 31, 2008, then civil counsel for Kelley, Alan Hughes, wrote a letter to plaintiff's counsel
21 explaining the lack of records:

22 Mr. Kelley was ready to attend the deposition set for today,
23 and to bring with him all documents responsive to the
24 subpoena *duces tecum* that were not destroyed in the June 26,
25 2008 fire. That fire destroyed the Stewart Title Building in
26 Everett where Mr. Kelley ran the business relevant to this
27 litigation. My understanding is that the **only surviving**
28 **records are tax returns**, which Mr. Kelley had at his home
office.

(Emphasis added).

1
2 30. On August 2, 2010, Kelley was deposed in connection with the direct suit
3 brought by Old Republic. During the deposition, Kelley testified that his business
4 maintained detailed spreadsheets, or "master logs," that contained information about
5 individual reconveyances his company was tracking and an accounting of fees earned.
6 When Kelley was questioned about the whereabouts of such spreadsheets, Kelley
7 explained that he no longer had any copies of those spreadsheets.

8 Q Do you have those master logs or other documents you
9 just referred to?

10 A I do not.

11 Q These all destroyed in the fire?

12 A Correct.

13
14 31. Kelley also affirmed during the deposition the contents of the October 31,
15 2008 letter written by attorney Hughes on his behalf regarding the prior destruction of
16 most of Kelley's business records:

17 Q: [Referring to the October 31, 2008 Hughes letter] it then
18 says "My understanding is that the only surviving records are
19 tax returns, which Mr. Kelley had at his home office." Is that
20 a true statement?

21 A: I believe the statement is true, though, subsequently, I was
22 able to find one or two other items, like business cards and a
23 few other things.

24 32. The existence of thousands of lines of detailed individual deeds of trust
25 recording numbers and corresponding reconveyance recording data is inconsistent with
26 Kelley's prior statements under oath that his business records, with the exception of tax
27 returns, business cards, and "few other things," had been destroyed in a fire. Without any
28 underlying records of what his clients had previously asked him to track, it is mysterious

1 how Kelley was able to recreate the thousands of lines of information shown on the
2 spreadsheets recovered from his residence.

3 33. In addition, other than these spreadsheets, agents did not recover in
4 hardcopy form other indications that Kelley was actively engaged in the business of
5 tracking reconveyances in 2011 and 2012. For example, agents did not recover any
6 copies of correspondence between Kelley and various escrow companies about the work
7 he was conducting or have completed, nor did they recover any copies of correspondence
8 or records of contact with trustees or lenders following up on reconveyances that had yet
9 to be recorded.

10 34. Because the spreadsheets recovered from Kelley's residence appear to be
11 computer generated, there is probable cause to believe that relevant electronic data
12 regarding the manner and dates of creation of the document may be found on the Images.

13 35. Finally, among the items seized from Kelley's residence were hardcopies of
14 what appeared to be detailed accounting ledgers that itemized by year and categories
15 purported Blackstone business expenses that, on the whole, appeared to match business
16 categories of business expenses that were declared for tax years 2010, 2011 and 2012 on
17 Blackstone's Forms 1120S. Upon review, however, some of the itemized expenses
18 appear not to be related to the operation of a reconveyance tracking business, and,
19 instead, appear to be personal expenses or expenses related to Kelley's campaign. For
20 example, in the recovered ledger for the time period covering 1/1/2012 – 12/31/2012,
21 Kelley included as part of Blackstone's business expenses certain payments he made to
22 an individual identified as "Miller." The total amount of payments equaled
23 approximately \$1394, and the expenses were categorized as "Business Supplies." A
24 review of records for Blackstone's Columbia Bank account *8470 showed that in 2012,
25 five checks were written out of the account made payable to Matt Miller. The total
26 amount of payments made to Matt Miller from the Blackstone Columbia Bank account
27 *8470 equaled the amount listed in the recovered Blackstone ledger for the year 2012.
28

1 36. On or about March 5, 2015, FBI Special Agent Michael Brown interviewed
2 Matthew Miller. Miller is the former campaign manager for Kelley during Kelley's
3 campaign for Auditor. Miller is currently employed by the Washington State Auditor's
4 Office as the Deputy Director of External Affairs. During the interview, Miller was
5 asked about the payments he received from the Blackstone Columbia bank account
6 *8470, and shown physical copies of the checks written to Miller. The majority of these
7 checks were dated prior to election day, which fell on November 6, 2012. The last check
8 was dated on the day of the election, November 6, 2012.

9 37. Miller did not recall specifically what those checks were for. However,
10 Miller stated that he never worked for Blackstone and was simply Kelley's campaign
11 manager. Miller believed the checks could be reimbursements for making copies during
12 the campaign. Miller also believed it was possible that Kelley wrote him a check to help
13 Miller out after the campaign was over, or for helping Kelley clean his office.

14 38. The recovery of hardcopies of Blackstone's accounting ledgers further
15 support the likelihood that the computers and electronic media seized from Kelley's
16 home will contain full electronic versions of accounting records relevant to this
17 investigation.

18 **V. PROTOCOL FOR SEARCH OF**
19 **COMPUTER WITH FILTER TEAM**

20 39. I am aware that Kelley is currently represented by counsel in connection
21 with this criminal investigation. As a result, there may be attorney-client privileged
22 material among the electronic records sought by this application for a warrant. In order
23 to prevent inadvertent exposure to such material by those involved in this investigation,
24 the search of the Images will be wholly conducted by IRS Special Agents from the
25 Criminal Division who, after the search and seizure, will have no further role in the
26 investigation of this matter, other than to establish chain of custody and, if needed, to
27 provide information and/or testimony regarding the conduct of this search and seizure.
28 The search and seizure team will be advised as to the identities of all relevant counsel and

1 will be instructed to segregate suspected attorney-client privilege materials and not
2 communicate to members of the investigative team the contents of such suspected
3 privileged material, and seize only material authorized by this warrant.

4 VI. ELECTRONIC STORAGE AND FORENSIC ANALYSIS

5 A. Scope of Examination

6 40. Based on my consultation with those who have specialized knowledge of
7 computers and other electronic devices, I understand that computers and electronic
8 storage media, like those imaged in connection with the March 13th Warrant, can store
9 information for long periods of time. Similarly, things that have been viewed via the
10 Internet are typically stored for some period of time on the device used to access the
11 Internet. This information can sometimes be recovered with forensic tools.

12 41. There is probable cause to believe that things that were once stored on such
13 devices may still be stored there, for at least the following reasons:

14 a. Based on information provided to me by those who have specialized
15 knowledge of computers and other electronic devices, I understand that computer files or
16 remnants of such files can be recovered months or even years after they have been
17 downloaded onto a storage medium, deleted, or viewed via the Internet. Electronic files
18 downloaded to a storage medium can be stored for years at little or no cost. Even when
19 files have been deleted, they can be recovered months or years later using forensic tools.
20 This is so because when a person "deletes" a file on a computer, the data contained in the
21 file does not actually disappear; rather, that data remains on the storage medium until it is
22 overwritten by new data.

23 b. Therefore, deleted files, or remnants of deleted files, may reside in
24 free space or slack space-that is, in space on the storage medium that is not currently
25 being used by an active file-for long periods of time before they are overwritten. In
26 addition, a computer's operating system may also keep a record of deleted data in a
27 "swap" or "recovery" file.
28

1 c. Wholly apart from user-generated files, computer storage media-in
2 particular, computers' internal hard drives-contain electronic evidence of how a computer
3 has been used, what it has been used for, and who has used it. To give a few examples,
4 this forensic evidence can take the form of operating system configurations, artifacts
5 from operating system or application operation, file system data structures, and virtual
6 memory "swap" or paging files. Computer users typically do not erase or delete this
7 evidence, because special software is typically required for that task. However, it is
8 technically possible to delete this information.

9 d. Similarly, files that have been viewed via the Internet are sometimes
10 automatically downloaded into a temporary Internet directory or "cache."

11 42. *Forensic evidence.* As further described in Attachment B, this application
12 seeks permission to locate not only electronically stored information that might serve as
13 direct evidence of the crimes described on the warrant, but also forensic evidence that
14 establishes how the devices seized and imaged were used, the purpose of their use, who
15 used them, and when. There is probable cause to believe that this forensic electronic
16 evidence might be on the Images because:

17 a. Data on the storage medium can provide evidence of a file that was
18 once on the storage medium but has since been deleted or edited, or of a deleted portion
19 of a file (such as a paragraph that has been deleted from a word processing file). Virtual
20 memory paging systems can leave traces of information on the storage medium that show
21 what tasks and processes were recently active. Web browsers, e-mail programs, and chat
22 programs store configuration information on the storage medium that can reveal
23 information such as online nicknames and passwords. Operating systems can record
24 additional information, such as the attachment of peripherals, the attachment of USB
25 flash storage devices or other external storage media, and the times the computer was in
26 use. Computer file systems can record information about the dates files were created and
27 the sequence in which they were created.
28

1 b. Forensic evidence on a device can also indicate who has used or
2 controlled the device. This "user attribution" evidence is analogous to the search for
3 "indicia of occupancy" while executing a search warrant at a residence.'

4 c. A person with appropriate familiarity with how an electronic device
5 works may, after examining this forensic evidence in its proper context, be able to draw
6 conclusions about how electronic devices were used, the purpose of their use, who used
7 them, and when.

8 d. The process of identifying the exact electronically stored
9 information on a storage medium that is necessary to draw an accurate conclusion is a
10 dynamic process. Electronic evidence is not always data that can be merely reviewed by
11 a review team and passed along to investigators. Whether data stored on a computer is
12 evidence may depend on other information stored on the computer and the application of
13 knowledge about how a computer behaves. Therefore, contextual information necessary
14 to understand other evidence also falls within the scope of the warrant.

15 e. Further, in finding evidence of how a device was used, the purpose
16 of its use, who used it, and when, sometimes it is necessary to establish that a particular
17 thing is not present on a storage medium.

18 43. *Manner of execution.* Because this warrant seeks only permission to
19 examine a device already in law enforcement's possession, the execution of this warrant
20 does not involve the physical intrusion onto a premises. Consequently, I submit there is
21 reasonable cause for the Court to authorize execution of the warrant at any time in the
22 day or night.

23 **B. Search Technique**

24 44. Based on the foregoing, and consistent with Rule 41(e)(2)(B) of the Federal
25 Rules of Criminal Procedure, law enforcement personnel will execute the search of the
26 Images pursuant to this warrant as follows: Searching the Images for the items described
27 in Attachment B may require a range of data analysis techniques. In some cases, it is
28 possible for agents and analysts to conduct carefully targeted searches that can locate

evidence without requiring a time-consuming manual search through unrelated materials that may be commingled with criminal evidence. In other cases, however, such techniques may not yield the evidence described in the warrant, and law enforcement may need to conduct more extensive searches to locate evidence that falls within the scope of the warrant. The search techniques that will be used will be only those methodologies, techniques and protocols as may reasonably be expected to find, identify, segregate and/or duplicate the items authorized to be seized pursuant to Attachment B to this affidavit.

VII. REQUEST FOR NONDISCLOSURE AND SEALING.

45. It has been a long standing, historical principle that search warrants are generally applied for and accorded secrecy pre-indictment. As explained by the Ninth Circuit in *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-14 (9th Cir. 1989):

We know of no historical tradition of public access to warrant proceedings. Indeed, our review of the history of the warrant process in this country indicates that the issuance of search warrants has traditionally been carried out in secret.

Normally a search warrant is issued after an *ex parte* application by the government and an in camera consideration by a judge or magistrate. *McDonnell Douglas Corp.*, 855 F.2d at 573. The practice of secrecy in warrant proceedings was recognized by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1977), where the Court considered whether a defendant has a constitutional right to make a post-indictment challenge to the truthfulness of an affidavit submitted in support of a warrant. In deciding that the defendant should have that right, the Court noted that it is impossible for the defendant to challenge the contents of the affidavits before the warrant is executed because the "proceeding is necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence." *Id.* at 169, 98 S.Ct. at 2683 In sum, we find no historical tradition of open search warrant proceedings and materials.

46. Consistent with the law of this Circuit and Supreme Court precedent, it is respectfully requested that this Court issue an order sealing, until further order of the

1 Court, all papers submitted in support of this application, including the application and
2 search warrants. I believe that sealing these documents is necessary because the items
3 and information to be seized are relevant to an ongoing investigation. Premature
4 disclosure of the contents of this affidavit and related documents may have a significant
5 and negative impact on the continuing investigation and may severely jeopardize its
6 effectiveness in the following ways:

7 47. As set forth above, and in the March 13th Affidavit, this investigation
8 involves allegations that Troy X. Kelley knowingly declared false and fraudulent
9 business expenses in Blackstone tax returns for tax years 2011 and 2012 in order to
10 ultimately reduce his own tax. While Kelley has been and is represented by counsel in
11 this matter, the details of this particular aspect of the investigation is not believed to be
12 known to Kelley. Among the items seized from Kelley's residence were detailed
13 accounting ledgers covering the relevant tax years that detailed some of the specific
14 expenses for Blackstone, including what appeared to be only the last names of a number
15 of individuals who received payments from Blackstone, or were beneficiaries or guests
16 where Kelley paid for meals. In order for these expenses to be legitimate, they must be
17 necessary and ordinary to the conduct of Blackstone's business, which Kelley has
18 declared in the 2011 and 2012 tax returns as consisting of "document tracking."
19 However, law enforcement cannot definitively conclude on the face of the ledgers
20 themselves whether or not these listed expenses were for legitimate business purposes.
21 This warrant seeks, among other things, electronic records of these detailed ledgers which
22 may assist law enforcement identify, more specifically, these individuals listed in the
23 hardcopy versions of the ledgers. However, even if we find the electronic records in the
24 Images, ultimately, law enforcement must locate and interview these third party
25 witnesses to be able to conclude whether the expenditures Kelley included under their
26 names were indeed in connection with any document tracking business conducted by
27 Blackstone.
28

1 48. The government has grave concerns that if this warrant and supporting
2 papers were currently disclosed to the public and Kelley prior to law enforcement
3 completing its investigation, our ability to obtain evidence from these and other third
4 party witnesses will be severely compromised. This is true even though law enforcement
5 has already obtained the images of the computers and electronic storage media and there
6 is little danger that the nature of the electronic evidence itself will be impacted by public
7 disclosure. That is because this is not an investigation that will simply turn on the nature
8 of what is found on the Images. What is found on the Images will likely lead to the
9 identification of additional witnesses from whom law enforcement will need to gather
10 further evidence. Disclosure to Kelley and others of this warrant and supporting material
11 may give Kelley and others an opportunity to obstruct or interfere in our investigation.
12 The concern is heightened by the fact that among the current charges considered by the
13 government against Kelley is perjury and obstruction of justice stemming from Kelley's
14 conduct during his litigation with Old Republic Title. For example, as detailed above,
15 Kelley testified under oath that his business records had been destroyed in a fire that
16 occurred in 2008. Yet agents recovered from his residence hundreds of pages of
17 spreadsheets that appear to contain some of the very records sought during that litigation.
18 For these reasons, I respectfully request sealing of the warrant and supporting papers for
19 a time deemed appropriate by this Court.

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VIII. CONCLUSION

49. For the reasons set forth above, there is probable cause to believe that evidence, fruits and/or instrumentalities of False Tax Filing, in violation of Title 26, United States Code, Section 7206(1), are located in the Images of computers and electronic storage media seized pursuant to the March 13th Warrant, as more fully described in Attachment A to this Affidavit. I therefore request that the court issue a warrant authorizing a search of the Images for the items more fully described in Attachment B hereto, incorporated herein by reference, and the seizure of any such items found therein.

Aaron Hopper
AARON HOPPER, Affiant
Special Agent,
Internal Revenue Service

SUBSCRIBED and SWORN to before me this 25th day of March, 2015.

J. Richard Creatura
J. RICHARD CREATURA
United States Magistrate Judge